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No. 329

In the Supreme Court of the United States.

OCTOBER TERM, 1945

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CHERNEY CALIFORNIA LUMBER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

CHENEY CALIFORNIA LUMBER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit, entered on March 31, 1945 (R. 350),[1] to the extent that it modifies the Board's order directed against the Cheney California Lumber Company.

OPINIONS BELOW

The *per curiam* opinion of the Circuit Court of Appeals (R. 349) is reported in 149 F. 2d 333. The findings of fact, conclusions of law, and order of the Board (R. I 10–51) are reported in 54 N. L. R. B. 205.

[1] "R. I" denotes references to the "Transcript of Record" and "R. II" to the "Supplemental Transcript of Record."

JURISDICTION

The decree of the Circuit Court of Appeals was entered on March 31, 1945 (R. 350). A petition for rehearing filed by the Board was denied on May 14, 1945 (R. 351). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. When an employer violates Section 8 (1) and (3) of the National Labor Relations Act by discriminatorily discharging four employees and violates Section 8 (1) of the Act by repeated and varied threats of economic reprisal for union activity and by granting economic benefits in return for abandonment of the union, may the Board properly enter an order which not only requires the employer to cease and desist from discrimination but also to cease and desist from "in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act."

2. Whether the circuit court of appeals may properly modify a back-pay award by providing for the deduction of amounts which the recipient could have earned, but did not, where the employer had not raised this issue before the Board and did not offer in court to show that any recipient had thus wilfully incurred losses of wages.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151 *et seq.*) are set out in the Appendix, pp. 25–27, *infra*.

STATEMENT

Upon the usual proceedings, the Board on December 30, 1943, issued its findings of fact, conclusions of law, and order (R. I 10–51). The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:[2]

The Company's employees became interested in unionization in the early fall of 1942, a few months after the Company began to operate the Greenville, California, sawmill (R. I 17; 60–61, 115, 126–127). In September of that year, approximately 17 or 18 mill employees signed application cards for membership in Lumber and Sawmill Workers, Local 4726, affiliated with the

[2] In the following statement references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

American Federation of Labor, hereinafter referred to as the Union (R. I 17; 126–127, 135).

On or about September 20, 1942, Pease, the general manager of the mill, called a meeting of all employees and urged them not to join a union (R. I 17–18; 127, 135–136, R. II 272–273, 311–312). Pease advised the group that some of the employees would suffer a loss of wages if the men joined the Union and a union scale were adopted (R. I 18; 127, 136, R. II 272–273). After the meeting two employees asked Pease why he was opposed to the Union. Pease told one that he did not "want a * * * thing to do with [unions]" (R. I 18–19; 128–129). The other reminded Pease that he was violating the employees' rights, and Pease replied that he did not "care much" what he was doing (R. I 20; R. II 281–282). Pease also told employee Glenn who was then opposed to the Union, "Glenn, before I would operate under the Union, under the contract, I'd shut the * * * thing down air tight" (R. I 19–20; R. II 313).

Sometime before the seasonal shut-down of the mill in December 1942,[3] Pease called a second meeting of the employees (R. I 20–21; R. II 273, 319–320), where the employees decided that their main objective in organizing was seniority (R. I 20–21; R. II 273–274). Pease thereupon told

[3] Because of unsuitable weather the sawmill practically shuts down each season from about December to March (R. I 87–88, R. II 279).

the men that he would grant them seniority rights and asked that a committee of three employees be appointed to "decide which ones should have seniority" and "which ones should have certain jobs" (R. I 20–21; R. II 273–274, 319–320). The men in return informed Pease that they would "just drop the case of the Union" (R. I 20–21; R. II 273–274). The employees appointed a seniority committee which thereafter conferred with Pease (R. I 21; R. II 274, 320–321). Pease submitted to the committee a working agreement which was accepted by the men (R. I 21; 166, R. II 321–322). The employees thereupon abandoned their attempts to achieve self-organization and ceased discussing the Union (R. I 22; 129, 136–137).

When the union movement was revived at the mill in the spring of 1943 (R. I 22, 25; 67–68, 81–83, 143–144, 146–147), employees Ware, Block, and Norberg were among its most outspoken advocates (R. I 25; 68, 96–98, 143–145). Shortly before March 18, 1943 (see R. I 152–153, 157, R. II 289), Foreman Higday accused Norberg, Ware, and Block of "trying to cause trouble" by bringing "the Union in" and advised them to "go some other place" if they "didn't like where [they were] working" (R. I 25–26; 143–144, 146–148.) A day or so after this discussion Pease called Norberg to his office and warned him that he, Block, and Ware were "talking too much,"

that he was going to dismiss Block and Ware, and that if Norberg did not "stop talking too much about things," he would have to dismiss Norberg also (R. I 26; 144–145, 148–149, 153). Thereafter, Pease told Norberg's brother that Norberg, Ware, and Block were "doing too much talking," that Ware was "stirring up too much trouble trying to get the men organized," that he was going to discharge Block and Ware,[4] and that he would discharge Norberg if he "didn't quit talking so much" (R. I 26; R. II 269–272).

On March 24 and 25, a majority of the employees signed applications for membership in the Union (R. I 22; 67–68, 82–84). The union organizer advised Pease of this fact and asked him to negotiate a contract with the Union (R. I 22; 69–71, 83–85, R. II 285). Pease challenged the Union's majority and suggested that the Board conduct an election (R. I 22–23; 70–71, 84–86, R. II 285), but threatened to close the mill before permitting it to "go Union" (R. I 22–23; 70, 85).

After the Union filed a petition for investigation and certification of representatives pursuant to Section 9 of the Act, the Company agreed to have a consent election conducted at the mill on June 2 (R. I 24; 73–75, 79, 191–192, 208). On account of protests by Allan and other employees,

[4] When Ware and Block first returned to work after this announcement, Pease discharged them (R. I 28, 31; 101–106, 153–158). These discharges, which the Board found were discriminatory (R. I 29, 32, 45), are discussed, *infra*, pp. 8–9.

the date of the election was, however, advanced to May 22 (R. I 24, 38; 79–81, 91, 191–192, 208–210). On the eve of the election the Company discharged employees Allan and Glenn [5] (R. I 24, 39; 196–200, R. II 343–347). Glenn and Allan voted in the election, but their eligibility was challenged by the Company on the ground that they had been discharged for cause (R. I 24, 39; 76–77, 200–201, 257–260, R. II 347), and consequently their votes were segregated and were not counted (R. I 24; 77, 201, 257–260, R. II 347). Without these votes, which were conceded to be in favor of the Union (R. I 259–260), the tally was 16 for the Union and 16 against it (R. I 24; 77, 258).[6]

The Board found that by the anti-union statements and activities of General Manager Pease

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[5] These discharges, which the Board found were discriminatory (R. I 41, 45), are discussed, *infra*, pp. 9–10.

[6] The challenged ballots remained unopened pending a decision by the Board in the instant case. After the Board issued its decision in the instant case finding that Allan and Glenn had been discriminatorily discharged (*infra*, pp. 9–10), the regional director on January 4, 1944 opened the challeneged ballots, which were for the Union, counted them, and on February 11, 1944 issued a Consent Determination of Representatives deciding that the Union was the exclusive representative of all the employees in the agreed unit. Thereafter, the Company refused to bargain collectively with the Union, charges of violation of Section 8 (1) and (5) were filed with the Board, a new complaint based thereon issued, and on July 10, 1945 the Board issued its decision finding that the Company had violated Section 8 (1) and (5) of the Act and ordering the Company to bargain with the Union. *Matter of Cheney California Lumber Co.*, 62 N. L. R. B., No. 160.

and Foreman Higday the Company interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (1) (R. I 45, 47–48).

Ware had been a member of the American Federation of Labor for about 3½ years, and he regularly wore a union button while working at Cheney (R. I 30; 96–97). Ware and Block were in the forefront of the movement to revive the Union at the mill (*supra*, p. 5). Block joined the Union on March 24, 1943 (R. I 27; 68, R. II 290–291), and Ware signed another designation card for the Union on that date and aided the Union organizer in signing up other employees (R. I 30; 68, 97–98). By their organizational activities Ware and Block incurred the enmity of Foreman Higday and General Manager Pease, and the latter stated to Norberg and his brother his intention to discharge Ware and Block for their union activities (*supra*, pp. 5–6). Immediately upon their return to work after this announcement, Ware and Block were discharged by Pease (R. I 28, 31; 101–106, 153–158). There is, as the Board found, no evidence in the record to support the reasons assigned by the Company for the discharges of Ware and Block (R. I 28–29, 31–32). The Board found that the Company discharged both Ware and Block because they had engaged in union activities (R. I 29, 32) and that the Company thereby discouraged membership in

the Union in violation of Section 8 (3) and (1) of the Act (R. I 45, 47–48).

Allan was a member of the United Brotherhood of Carpenters and Joiners when he was hired by Cheney and informed Pease of that fact when he reported for work (R. I 36, 38; 179, 187). On April 15, Allan signed a membership application in the Union and thereafter solicited on its behalf (R. I 38; 187–190). Glenn joined the Union on March 27, 1943 (R. I 34; 160, R. II 314–315), and informed Pease of that fact (R. I 34–35; R. II 315–316). Thereafter, Pease who had formerly been friendly to Glenn, would pass him without speaking (R. I 35; R. II 318–319). Glenn solicited on behalf of the Union and succeeded in signing up 11 employees (R. I 35; R. II 327–328). He also wore his union button, and Foreman Higday maligned him for doing so (R. I 35–36; R. II 328, 329). On May 19, the agreement for holding a consent election was signed, and at Allan's request, the time for holding the election was advanced to May 22 (*supra*, pp. 6–7). At this time also, Glenn was appointed the Union's observer in the forthcoming election (R. I 24, 36; 75). On May 21, Allan and Glenn were discharged (R. I 39; 196–197, R. II 343). The termination slips issued to them on May 21 or 22 stated falsely that they had "left voluntarily" (R. I 39; 198–200, R. II 346). The Board found that the Company discharged both Glenn and Allan because of their union activities

and in order to influence adversely the election held by the Board to determine the bargaining representative of the Company's employees (R. I 41), and that the Company thereby discouraged membership in the Union in violation of Section 8 (3) and (1) of the Act (R. I 45, 47–48).

The Board ordered the Company to "1. Cease and desist from: (a) discouraging membership in Lumber and Sawmill Workers Local 2647, affiliated with the American Federation of Labor, or in any other labor organization of its employees by discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of their employment; (b) in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act." 2. Take the following affirmative action: (a) offer immediate and full reinstatement to the four employees; (b) "Make whole [the four employees] for any loss of pay they have suffered by reason of the respondent's discrimination against them, by payment to each of them of a sum of money equal to the amount which he normally would have earned as wages

from the date of his discharge to the date of the respondent's offer of reinstatement, less his net earnings during said period"; (c) post notices; (d) notify the Regional Director for the Twentieth Region what steps the Company has taken to comply with the Board's order (R. I 11–13).

On May 20, 1944, the Board petitioned the court below for enforcement of its order (R. I 51–55). The Company having failed to appear in the court below, the Board on February 10, 1945, moved the court below to enter a decree enforcing its order. On March 26, 1945, the Company answered the Board's motion, by proposing certain amendments to the form of decree submitted by the Board. Among the modifications proposed by Cheney were the deletion of paragraph 1 (b) of the Board's order and the addition to paragraph 2 (b) of a proviso "to the effect that, as used in that paragraph, the term 'loss' means loss actually incurred, and the term 'net earnings' includes those which the employee could have earned, but has, without excuse, failed to earn." This issue had not been raised before the Board at any time. The Company in court made no allegation that any employee had failed without excuse to earn during the period of his discriminatory discharge, but merely asked the court to modify the Board's order in that respect. On March 31, 1945, the court below handed down its *per curiam* opinion and entered a decree modifying the

Board's order *inter alia* by striking out all of paragraph 1 (b), by adding to paragraph 2 (b) the words "provided that, as used in this paragraph, the term 'loss' means loss actually incurred, and the term 'net earnings' includes those which the employee could have earned, but has, without excuse, failed to earn," and by striking from paragraph 2 (c) all references to paragraph 1 (b), and enforcing the Board's order as modified (R. 350).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Board had no power in the circumstances of this case to enter an order in terms which required the Company to cease and desist from "in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act."

2. In holding that the Board could not enter a back-pay order which did not in terms limit the employee's recovery of back pay to the amount of the losses which he actually incurred, and in including within deductible net earnings such

earnings as the employee could have earned, but has without excuse failed to earn.

3. In entertaining the issue of the deductibility of earnings which the employee could have earned, but has without excuse failed to earn, when that issue was not raised before the Board at any time and no extraordinary circumstances appear to excuse the failure to raise the issue before the Board.

4. In refusing to enforce, and in modifying or setting aside, paragraphs 1 (b), 2 (b), and 2 (c) of the Board's order.

REASONS FOR GRANTING THE WRIT

I

1. In concluding that paragraph 1 (b) should be stricken from the Board's order, the court below misinterpreted this Court's holding in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 432–438, and reached a result which is in direct conflict with that decision, other decisions of this Court, and decisions of other circuit courts of appeals, including *National Labor Relations Board* v. *May Department Stores*, 146 F. 2d 66, 71 (C. C. A. 8), certiorari granted, No. 39, October Term, 1945.

In the *Express Publishing* case the Circuit Court of Appeals for the Fifth Circuit had deleted a cease and desist provision virtually identical with paragraph 1 (b) of the Board's order in the instant case (312 U. S. at 430). This Court restored only the portion of the deleted provision

pertaining to collective bargaining, since in that case the only unfair labor practice found by the Board had been a refusal to bargain and the Board had "made no finding based either on the specific circumstances disclosed by the record or on its own expert judgment [as to the] relation [of a refusal to bargain] to the policy embodied in § 7, or * * * [to] the other types of unfair practices some of which are enumerated in § 8" (312 U. S. at 434–435, 437–439). The part of the cease and desist order which this Court reinstated required the employer to cease and desist from "In any manner interfering with the efforts of the [union] to bargain collectively with the [employer]" (312 U. S. at 438–439).

Under the principles announced by this Court in the *Express Publishing* decision, paragraph 1 (b) of the Board's order in this case should have been enforced in full, in view of the Company's numerous and persistent acts in violation of the Act. For the *Express Publishing* opinion states: "Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts. * * * The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the

past" (312 U. S. at 436–437). Other cases in which this Court had enforced broad cease and desist orders were distinguished in the *Express Publishing* opinion on the ground that such orders were justified in those cases because "the record disclosed persistent attempts by varying methods to interfere with the right of self-organization in circumstances from which the Board or the court found or could have found the threat of continuing and varying efforts to attain the same end in the future" (312 U. S. at 437–438).

A cease and desist order in the terms of paragraph 1 (b) of the instant order is particularly appropriate where, as in the instant case, an employer has not only violated Section 8 (1) by acts of interference, restraint, and coercion, but has also violated Section 8 (1) and 8 (3) by discouraging union membership and activity by discriminatorily discharging some of its employees. The latter offense "goes to the very heart of the Act" (*National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C. C. A. 4)) and warrants the broad injunctive order as "probably the primary wrong against which section 8 (1) * * * was directed." *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 869 (C. C. A. 2), certiorari denied, 304 U. S. 576, 585. The Senate Committee which reported the National Labor Relations Act recognized that "if the right to be free from employer interference in self organiza-

tion or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of the opportunity for work." S. Rep. No. 573, 74th Cong., 1st Sess., p. 11. With respect to a discriminatory refusal to hire union members, in violation of Section 8 (3) of the Act, this Court noted that: "The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization." *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 185.

In the instant case the Board's order contained only two cease and desist provisions—one prohibiting merely future violations of Section 8 (3) and the other prohibiting future violations of Section 8 (1). By striking the provision directed at violations of Section 8 (1), the court below, therefore, deleted all of the prohibitory provisions as to those 8 (1) violations which were not related to discrimination with respect to hire and tenure of employment. Consequently, the court below not only failed to follow the *Express Publishing* case (312 U. S. at 436–438), by prohibiting future violations of the Act related to past violations and reasonably foreseeable therefrom, but also failed to prohibit future violations identical to those of which the Board and the court had just found the Company

guilty. Thereby the court eliminated a cease and desist provision which the Act *requires* the Board to include in its order—namely, one directed to unfair labor practices of which the employer has been found guilty. See National Labor Relations Act, Section 10 (c); *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265; *Express Publishing* case, *supra*, at 432.

2. Since its decision in the *Express Publishing* case, this Court has enforced cease and desist orders identical with the one here involved where, as in the instant case, the Board found that the employer had engaged in conduct interfering with, restraining, or coercing employees in the exercise of their right to self-organization. See *National Labor Relations Board* v. *Automatic Maintenance Machinery Co.*, 315 U. S. 282, enforcing 13 N. L. R. B. 338, 362 (involving violations of Section 8 (1), (2), (3), and (5)); *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, enforcing 18 N. L. R. B. 591, 640 (involving violations of Section 8 (1) and (3)); *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, enforcing 26 N. L. R. B. 1182, 1235 (involving violations of Section 8 (1) and (3)). The Circuit Courts of Appeals for the First, Second, Fourth, Sixth, Eighth and Tenth Circuits and the Court of Appeals for the District of Columbia enforce Board orders requiring the employer to cease and desist

in terms identical with paragraph 1 (b) of the order in the instant case where the Board has found that the employer engaged in conduct interfering with, restraining, or coercing employees in the exercise of their right to self-organization.[1] There is, therefore, a direct conflict between the decision of the Ninth Circuit Court of Appeals in the instant case and the decisions of this Court and of seven other Courts of Appeals.

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[1] See e. g. *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 890–891 (C. C. A. 1), certiorari denied, 313 U. S. 595 (8 (1), (3), (5)); *National Labor Relations Board* v. *Brezner Tanning Co., Inc.*, 141 F. 2d 62, 65 (C. C. A. 1), enforcing 50 N. L. R. B. 894, 896 (8 (1), (3)); *National Labor Relations Board* v. *Van Deusen*, 138 F. 2d 893, 895–896 (C. C. A. 2) (8 (1), (3)); *National Labor Relations Board* v. *Air Associates*, 121 F. 2d 586, 592 (C. C. A. 2) (8 (1), (3)); *National Labor Relations Board* v. *Collins & Aikman Corp.*, 146 F. 2d 454, 456–457 (C. C. A. 4) (8 (1), (3)); *National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C. C. A. 4) (8 (1), (3)); *National Labor Relations Board* v. *Burke Machine Tool Co.*, 133 F. 2d 618 (C. C. A. 6), enforcing 36 N. L. R. B. 1329, 1347 (8 (1), (5)); *National Labor Relations Board* v. *Bersted Mfg. Co.*, 128 F. 2d 738 (C. C. A. 6), modifying 124 F. 2d 409, 412 (8 (1), (3)); *Onan* v. *National Labor Relations Board*, 139 F. 2d 728, 730 (C. C. A. 8) (8 (1), (3)), certiorari denied, No. 814, October Term, 1944; *National Labor Relations Board* v. *May Department Stores Co.*, 146 F. 2d 66, 71 (C. C. A. 8), certiorari granted, No. 39, October Term, 1945 (8 (1), (5)); *National Labor Relations Board* v. *Concordia Ice Co., Inc.*, 143 F. 2d 656 (C. C. A. 10), enforcing 51 N. L. R. B. 1068, 1069–1070 (8 (1), (5)); *National Labor Relations Board* v. *Keystone Freight Lines*, 126 F. 2d 414 (C. C. A. 10), enforcing 24 N. L. R. B. 1153, 1181 (8 (1), (2), (3)); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. 2d 641, 647–648 (App. D. C.) (8 (1), (2)).

In the *May* case, *supra*, certiorari granted, No. 39, October Term, 1945, the Circuit Court of Appeals for the Eighth Circuit enforced, with a modification limiting the effect of the order to the employees there involved, a cease and desist order similar to paragraph 1 (b) of the Board's order in the instant case. The *May* case involves a violation of Section 8 (1) of the Act by taking action unilaterally respecting wage increases for its employees without notifying the certified exclusive bargaining representative of the employees in an appropriate unit or giving such representative an opportunity to negotiate respecting such wage increases, and a violation of Section 8 (5) by refusing to bargain collectively with the labor organization certified by the Board as the exclusive bargaining representative of the employees in an appropriate unit. In view of the widespread and diversified nature of the employer's violations here, the conflict with the *May* decision is particularly apparent.

3. The question presented by this action of the Ninth Circuit Court of Appeals is of importance in the administration of the Act. In striking the provisions of the Board's cease and desist order prohibiting future violations identical with or related to those of which the Company was guilty, the court below seriously interfered with the effective administration of the Act. The problem is of special importance because this erroneous construction of the *Express Publishing* decision

is not limited to the Ninth Circuit. The Circuit Courts of Appeals for the Third, Fifth, and Seventh Circuits, which formerly enforced cease and desist provisions identical with paragraph 1 (b) of the instant order, where the employer had interfered with, restrained, or coerced his employees in the exercise of their right to self-organization, have, like the court below, recently refused to enforce such orders.[8] With four Cir-

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[8] Compare e. g. *National Labor Relations Board* v. *Phillips Gas & Oil Co.*, 141 F. 2d 304, 306 (C. C. A. 3), enforcing 51 N. L. R. B. 376 (8 (1)) and *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. 2d 494, 495–496 (C. C. A. 3), enforcing 32 N. L. R. B. 1145, 1266 (8 (1), (2), (3)) with *General Motors Corp.* v. *National Labor Relations Board*, decided June 20, 1945, 16 L. R. R. 660 (C. C. A. 3), modifying and enforcing 59 N. L. R. B., No. 205 (8 (1), (3), (5)); *National Labor Relations Board* v. *Montag Brothers, Inc.*, 140 F. 2d 730, 731 (C. C. A. 5), enforcing 51 N. L. R. B. 366, 367 (8 (1), (3)) and *National Labor Relations Board* v. *Peyton Packing Co., Inc.*, 142 F. 2d 1009, 1010 (C. C. A. 5), certiorari denied, 323 U. S. 730, enforcing 49 N. L. R. B. 828, 854 (8 (1), (3)) with *National Labor Relations Board* v. *Lipshutz*, 149 F. 2d 141, 142 (C. C. A. 5), modifying and enforcing 56 N. L. R. B. 1749, 1752–1753 (8 (1)), and the decree entered on June 26, 1945, and opinion of the court on July 30, 1945, on denial of the Board's motion for rehearing, in *Le Tourneau Company of Georgia* v. *National Labor Relations Board*, Case No. 10954 (C. C. A. 5) after reversal in *National Labor Relations Board* v. *Le Tourneau Company of Georgia*, decided April 23, 1945, No. 452, October Term, 1944 (8 (1), (3)); *National Labor Relations Board* v. *Sunbeam Electric Mfg. Co.*, 133 F. 2d 856, 861–862 (C. C. A. 7) (8 (1)) and *National Labor Relations Board* v. *Faultless Caster Corp.*, 135 F. 2d 559, 562 (C. C. A. 7) (8 (1), (2), (3)) with *National Labor Relations Board* v. *Servel, Inc.*, decided May 1, 1945, 16 L. R. R. 405 (C. C. A. 7), modi-

cuits adopting one policy and seven the contrary policy, clarification of the question by this Court is essential.

II

1. The court below also erred in modifying the back-pay provision (paragraph 2 (b)) of the Board's order by adding to it a proviso to the effect that "as used in this paragraph, the term 'loss' means loss actually incurred, and the term 'net earnings' includes those which the employee could have earned, but has, without excuse, failed to earn." In adding this provision to the Board's order, the court below misinterpreted the holding of the *Phelps Dodge* case and reached a result which is squarely in conflict with that decision and with decisions of other circuit courts of appeals.

In the *Phelps Dodge* case, the Circuit Court of Appeals for the Second Circuit modified the Board's back-pay order by awarding the claimant "the difference between his actual earnings plus what he failed without excuse to earn and the amount he would have earned but for the unfair labor practices" (113 F. 2d 202, 206). This Court, in setting aside that modification, stated: "But though the employer should be allowed to go

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fying and enforcing 57 N. L. R. B. 1383, 1387 (8 (1), (3)) and *National Labor Relations Board* v. *J. I. Case Co.*, 134 F. 2d 70, 73 (C. C. A. 7), modifying and enforcing, 42 N. L. R. B. 85, 99, decree entered on May 11, 1944, after modification on another point and affirmance in *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332 (8 (1), (5)).

to proof on this issue, the Board's order should not have been modified by the court below. The matter should have been left to the Board for determination by it prior to formulating its order and should not be left for possible final settlement in contempt proceedings" (313 U. S. at 200). The Ninth Circuit's decision modifying the Board's order rather than remanding it to the Board for initial determination of any issue as to wilful losses is also in conflict with decisions of other Circuit Courts of Appeals. See *Corning Glass Works* v. *National Labor Relations Board*, 129 F. 2d 967, 969–973 (C. C. A. 2); *National Labor Relations Board* v. *Condenser Corp. of America*, 128 F. 2d 67, 78–79 (C. C. A. 3); *National Labor Relations Board* v. *Sewell Hats, Inc.*, Case No. 10942 (C. C. A. 5), order entered May 19, 1945, remanding to Board for determination of wilful losses incurred and amount of back pay due; *National Labor Relations Board* v. *Newberry Lumber Co.*, 123 F. 2d 831, 839–840 (C. C. A. 6); *Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. 2d 452, 461–462 (C. C. A. 7), certiorari denied, 317 U. S. 650; *National Labor Relations Board* v. *Harbison-Walker Refractories Co.*, 137 F. 2d 596, 597 (C. C. A. 8).

2. The court below also erred in the instant case in entertaining the wilful losses issue. A corollary to the *Phelps Dodge* pronouncement that the wil-

ful losses issue must be "left to the Board for determination by it prior to formulating its order" (313 U. S. at 200) is that the issue must be specifically raised before the Board so as to afford "the Board opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 256. In the instant case, the issue of wilful losses was not raised before the Board at any time. Indeed, even in the court below the Company made no allegation that any employee had sustained wilful losses, but merely asked the court to modify the Board's order in that respect. Where, as here, no "extraordinary circumstances" appear to excuse the failure to raise the issue before the Board, the courts cannot entertain it. National Labor Relations Act, Section 10 (e); *National Labor Relations Board* v. *Baldwin Locomotive Works,* 128 F. 2d 39, 50 (C. C. A. 3); *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 255-256; *Corning Glass Works* v. *National Labor Relations Board,* 129 F. 2d 967, 972-973 (C. C. A. 2). The Ninth Circuit's decision to entertain the wilful losses issue when it had not been raised before the Board is in conflict with the Third Circuit's decision in the *Baldwin Locomotive* case, *supra,* and with this Court's decision in the *Marshall Field* case, *supra.*

CONCLUSION

The questions raised by the decision below are of substantial public importance. The decision conflicts with decisions of this Court and of other circuit courts of appeals. It is respectfully submitted that this petition for a writ of certiorari be granted.

HAROLD JUDSON,
Acting Solicitor General.

ALVIN J. ROCKWELL,
General Counsel, National Labor Relations Board.

AUGUST 1945.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive,

and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testi-

mony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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